Bergensons Property Services, Inc. *and* Service Employees International Union, Local 2028, AFL–CIO. Case 21–CA–34528

March 31, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On February 11, 2002, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board had delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions as set forth below,[2] to modify the remedy, and to adopt the recommended Order as modified and set forth in full.

The General Counsel excepts to the failure of the administrative law judge's proposed Order to provide for notices to employees in both Spanish and English, in view of the fact that a majority of the Respondent's employees are primarily Spanish-speaking. We find merit in the General Counsel's exception and shall order that the notice be in Spanish as well as in English. *Three Sisters Sportswear*, 312 NLRB 853 (1993), enfd. 55 F.3d 684 (D.C. Cir. 1993). The General Counsel also requests that the notice be mailed to the last known addresses of Respondent's employees who were employed since the date that the unfair labor practices herein occurred. Since the uncontradicted testimony of Respondent's witnesses establishes that the Respondent no longer has a cleaning contract with the University of California at San Diego, we shall order the Respondent to mail copies of the notice to the employees. *CleanPower, Inc.*, 316 NLRB 496, 498 (1995); *Control Services*, 315 NLRB 431, 459 (1994).[3]

CONCLUSION OF LAW

By threatening employees with loss of benefits because of their support for the Union, and by threatening to discharge and discharging employee Alejandra Rodriguez because of her support for the Union, Respondent, Bergensons Property Services, Inc., has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bergensons Property Services, Inc., San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of benefits or discharge because they engage in activity on behalf of the Service Employees International Union, Local 2028, AFL–CIO, or other concerted activity protected by Section 7 of the Act.

(b) Discharging or otherwise discriminating against employees because they engage in union or other concerted activity protected by the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Alejandra Rodriguez full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position of employment, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Alejandra Rodriguez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Alejandra Rodriguez in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its San Diego business office copies of the attached no-

[1] There were no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by threatening employees with loss of benefits and discharge because they engaged in union activity and Sec. 8(a)(3) and (1) of the Act by discharging employee Alejandra Rodriguez.

[2] The judge failed to include in his decision a "Conclusions of Law" section that sets out the specific violations of Sec. 8(a)(1) and (3), which he found in this case. In adopting the judge's substantive findings here, we shall provide below formal "Conclusions of Law" in order to correct this inadvertent omission.

[3] We shall also conform the judge's recommended Order and notice to the Board's standard language.

tice marked "Appendix"[4] in both English and Spanish, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, and maintain the notices for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Within 14 days after service by the Region, mail signed copies of the attached notice in both English and Spanish, at its own expense, to the last known address of each employee employed by the Respondent at the University of California at San Diego location at any time since April 25, 2001, and provide a copy of the mailing to the Union and to the Regional Director for Region 21.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with loss of benefits or discharge because you engage in activity on behalf of Service Employees International Union, Local 2028, AFL–CIO, or other concerted activity protected by Federal law.

WE WILL NOT discharge or otherwise discriminate against you because you engage in union or other concerted activity protected by Federal law.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Alejandra Rodriguez immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Alejandra Rodriquez whole for the losses incurred as a result of the discrimination against her, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Alejandra Rodriguez and within 3 days thereafter we will notify her in writing that this has been done and that evidence of the unlawful discharge will not be used against her in any way.

BERGENSONS PROPERTY SERVICES, INC.

Robert MacKay, Esq. and *Sonia Sanchez, Esq.,* for the General Counsel.

Craig A. Schloss, Esq., of San Diego, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at San Diego, California, on December 3 and 4, 2001, upon the General Counsel's complaint alleging that the Respondent discharged Alejandra Rodriguez in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The complaint also alleges two violations of Section 8(a)(1).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that Rodriguez was rude and insubordinate during a company meeting of employees and was therefore discharged for cause.

On the record as a whole, including my observation of the witnesses, briefs[1] and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended Order:

I. JURISDICTION

The Respondent is a California corporation engaged in providing nonretail cleaning and janitorial services. The Respondent admits that in connection with its business it annually provided services valued in excess of $50,000 for the Univer-

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] The Respondent's brief was filed on January 10, 2002, 3 days after the agreed-upon date that briefs would be submitted. Counsel for the General Counsel therefore filed a motion that I reject the brief as being untimely filed. Since there is no assertion that the General Counsel or Charging Party would somehow be prejudiced if I receive the Respondent's brief, I deny the General Counsel's motion. I have considered the Respondent's arguments.

sity of California at San Diego (UCSD, which I take notice is a public institution) and annually derived gross revenues in excess of $1 million. The Respondent denied that it is an employer engaged in interstate commerce, apparently on some kind of a theory that it was doing business for a public institution which had some control over the manner in which it performed its services and compensated its employees. Even if the Respondent had offered sufficient facts to support this theory, I would reject it. *Management Training Corp.*, 317 NLRB 1355 (1995). Since the service and revenue amounts admitted are sufficient to establish the Board's jurisdiction, I conclude that the Respondent is an employer engaged in interstate commerce within the meaning of Section (2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent contends that it is without knowledge that Service Employees International Union, Local 2028, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act. I find that the Union in fact admits to membership employees of employers engaged in interstate commerce and represents those employees in matters involving wages, hours, and other terms and conditions of employment. It is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Respondent operates a janitorial service and employs, for the most part, individuals of Mexican descent whose first language is Spanish. Brothers Mark (or Marc) and Aram Minasian are co-owners of the Respondent and together run the business. Until about the time of the events here, Mark was in charge of the UCSD account. He moved to the midwest to be in charge of operations there and Aram replaced him at UCSD.

Although there had apparently been some union activity in the past, it was not ongoing. Thus when the Union was contacted by employees and met with them after work at UCSD early in the morning of April 25, 2001,[2] this was the first union activity for about 2 years.

The meeting became known to the Respondent's management and, according to Aram, a meeting of employees was set for the afternoon of April 25, "to actually get to the crux of what was going on." There is no question that the Respondent's meeting for employees on April 25 was in response to their meeting with union representatives. Indeed, the Respondent admits it.

The meeting started with Area Supervisor Daniel Wences discussing safety and materials for about 10 minutes, during which Alejandra Rodriguez stated her view that employees were not being furnished adequate materials and supplies. She said, "In my town, they say, washing the head of a donkey is to waste soap and water." Rodriguez testified that everyone, including Wences, laughed. Wences testified that he was insulted.

Then Minasian spoke, first noting that everyone was busy so he would not take too much time, but this was his first chance to talk to the employees. Rodriguez suggested that if he was too busy, perhaps he should go back to his office and schedule the meeting for another time.

During his short talk, Minasian announced that the Respondent was instituting a raffle system whereby supervisors would give employees raffle tickets when they saw an employee do something commendable. Then the winner of the raffle each month would receive extra money.[3] Rodriguez suggested that the Respondent could do better by giving all the employees a raise. Such would be more fair.

Division Manager Evangelina Flores discussed insurance and stated, in effect, that employees were not getting insurance because of the Union. She also told Rodriguez to calm down, asked if Rodriguez was speaking for other employees, and when the meeting ended, told Rodriguez that she should be grateful and if she was the boss, she would fire Rodriguez.

Unquestionably, Rodriguez made numerous comments at this meeting. She testified these comments were always respectful and she always asked permission before speaking. The Respondent's witnesses testified that she was rude, had insulted Wences by calling him a donkey, and was generally insubordinate. The Respondent maintains that it had no alternative but to discharge her and she was so notified the next day.

B. Analysis and Concluding Findings

1. Threats

It is alleged that Minasian and Flores (a) threatened employees with loss of benefits and, (b) threatened employees with termination because of their support for the Union.

Rodriguez testified that Flores said, during the course of her comments, "It has not been possible to get that insurance provided to you because the union has been preventing the business from signing." Flores did not further explain what she meant, but it is clear that she implicitly threatened employees that any activity on behalf of the Union caused them not to get benefits. Such a conclusion is not negated by Flores' testimony.

Flores testified that one employee "asked what happened with the insurance and I said that it was being held and I felt that there were politics because the Union was involved and were making sure that we didn't get the insurance money. I might have mentioned something like that."

I conclude that Flores threatened employees with loss of benefits if they were to engage in activity on behalf of the Union and thereby violated Section 8(a)(1).

After the discussion about insurance, Rodriguez testified, "I said, Ms. Ava, I would like to clarify something that when I take the floor, it is something personal, as far as my salary is concerned. She said, you again? I said, yes, ma'am, because I started out working at $5.75. When they hired me, they told me that they were going to give me a raise of 25 cents. I told her I finished my six months and my salary was not raised and she, upset, said to me, if you do not like it, leave. What are you

[2] All dates are in 2001.

[3] The General Counsel does not contend that Minasian's announcement of the raffle constituted an unlawful promise of a benefit, nor was it litigated as such.

doing here? The way that you are talking, why do you not go to the union?"

The question Rodriguez asked about her wages, in the presence of other employees and during a general meeting where terms and conditions of employment were discussed was concerted activity protected by the Act. See *Avery Leasing*, 315 NLRB 576, 580 fn. 5 (1994). Thus telling Rodriguez "to leave" if she did not "like it" was a threat of discharge violative of Section 8(a)(1).

In addition, at the end of the meeting, Flores told Rodriguez that if she was the boss, she would fire Rodriguez. Rodriguez told her to go ahead. In this context, Flores statement was threat of discharge in violation of Section 8(a)(1).

2. The discharge

Unquestionably Rodriguez was an outspoken critic of the Respondent at the employee meeting on April 25. In fact, she spoke so much that at one point Flores asked if she was the leader. Rodriguez denied that she was, but was the most vocal of the employees. With her story about washing a donkey, she questioned the sincerity of Wences in his discussion about supplies. She questioned the fairness of the proposed raffle, and she asked why she had not received the wage increase she had [been] promised. In short, on numerous occasions she challenged the Respondent on matters involving wages, hours and other terms and conditions of employment. And she exchanged words with Flores as the employees were leaving the meeting.

Rodriguez voiced her concerns at a meeting called by the Respondent for the express purpose of discussing conditions of employment and countering whatever the Union had told employees early that morning. In doing so, she was clearly engaged in concerted activity protected by the Act. See *Enterprise Products*, 264 NLRB 946 (1982). In this context, I conclude that her termination was violative of Section 8(a)(1).

In addition, I conclude that her discharge was meant to discourage activity on behalf of the Union and was therefore violative of Section 8(a)(3). The discharge occurred 1 day after the Respondent learned that employees had met with representatives of the Union. Minasian even admitted that he called the meeting of employees in reaction to their having met with the Union, from which I infer that he was concerned about, and opposed to, their union activity. Flores suggested that Rodriguez was the leader—a reasonable assumption considering that she repeatedly challenged statements by management. The Respondent offered no evidence that anyone had ever been disciplined, much less discharged, for being rude. Finally, even accepting the Respondent's version of her behavior, discharge seems patently excessive and unreasonable, from which I infer that the true motive lie elsewhere. *Shattuck Denn Mining Corp.*, 362 F.2d 466 (9th Cir. 1966).

Thus I conclude that Rodriguez was unlawfully discharged and she should be ordered reinstated unless by her actions Rodriguez lost protection of the Act or rendered herself unfit for further employment.

Such is the crux of the Respondent's defense. The Respondent argues that Rodriguez was loud, rude, insulting, and disrespectful. Therefore the Respondent had no choice but to discharge her. Minasian testified that she was discharged because: "It was the nature of how Ms. Rodriguez was conducting herself in the meeting. All of the things that she discussed during the meeting could have been handled at a later date. They weren't germane to having to be, you know, interrupting and breaking in on everybody's else's—especially my presentation. She was just patently disrespectful and in retrospect, when we were looking at it after the meeting, it looked as though she was doing it on purpose and putting us in a situation where we had to make a choice and, you know, it was subverting our authority and disrupting the meeting and taking us off course and then challenging us to fire her."

In effect, Minasian testified that employees had no right to question management's view of matters relating to working conditions. It was his position that her comments should have been made at another time. I do not accept that the Respondent can so limit employees' participation in a meeting called by management for the avowed purpose of countering whatever union representatives may have told employees.

No doubt that even in the context of concerted or union activity an employee can engage in such egregious and opprobrious behavior as to lose protection of the Act or be deemed unfit for further employment. But the Board has long held, with court approval, that in such situations some tolerance must be allowed, where the allegedly insubordinate behavior is part of the res gestae protected activity. See *Postal Service v. NLRB*, 652 F.2d 409 (5th Cir. 1981), and cases cited therein. Thus recently, the Board held that the line had not been crossed where, in a company meeting of employees, the discharged employee used abrasive and vulgar language directed toward the plant manager. *CKS Tool & Engineering, Inc. of Bad Axe*, 332 NLRB 1578 (2000).

While I believe that Rodriguez was outspoken, even loud, I do not credit the Respondent's witnesses. I believe they exaggerated the actions of Rodriguez. For instance, Minasian purchased soft drinks for the employees. When the meeting was over, witnesses for the Respondent testified that Rodriguez "threw (her) coke on the table," as if she intended to hurt someone, or in fact did so or splattered the contents. Rodriguez admitted that she gave the coke back, but testified that she did not "throw" it. I credit Rodriguez. I believe that the Respondent's witnesses attempted to make out Rodriguez in the worst possible light in order to justify the action of discharging her.

Even accepting the Respondent's characterization of her behavior, which I am not inclined to do, such falls short of losing protection of the Act. And that it is issue here. This is not a case where the employee's act might, in some other context, justify discharge. The actions of Rodriguez arose out of the incipient union campaign and were otherwise concerted and protected by the Act. Thus the only question is whether she stepped over the line and lost the Act's protection or rendered herself unfit for further employment. For the reasons given above, I conclude not. Therefore, I conclude that by discharging Rodriguez the Respondent violated Section 8(a)(1) and (3) of the Act, and the traditional remedy ordered.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease

and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including offering reinstatement to Alejandra Rodriguez and make her whole for any loss of earnings and other benefits in accordance with the provisions *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]